

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP DREW MITCHELL,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 247129

Wayne Circuit Court

LC No. 02-010934-01

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529. Following a jury trial, he was acquitted of the armed robbery charge, but convicted of the lesser offense of unarmed robbery, MCL 750.530. He was sentenced as a fourth-felony habitual offender, MCL 769.12(a), to a term of life imprisonment. He appeals as of right. We affirm defendant's conviction, but vacate his sentence and remand for resentencing.

Defendant first argues that the prosecutor improperly elicited testimony that he exercised his right to remain silent, thereby violating his right to due process. We disagree. We review constitutional questions de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

It is well settled that a prosecutor may not use a defendant's post-*Miranda*¹ silence as evidence of guilt or to cast doubt on a defendant's credibility. See *People v Dennis*, 464 Mich 567, 572-574; 628 NW2d 502 (2001). However, "the inadvertent elicitation of testimony that [a] defendant exercised his *Miranda* right to decline police questioning . . . d[oes] not constitute a violation of [the] defendant's constitutional right of due process" *Dennis, supra* at 583. In this case, when asked about the extent of his duties, a police officer mentioned that he asked defendant whether he wanted to make a statement. To the extent the officer's response can be viewed as a reference to defendant's exercise of his right to remain silent, it was inadvertent, brief and isolated. Significantly, the officer never stated whether defendant actually made a statement or not. Moreover, no attempt was made to draw an adverse inference from defendant's

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

(presumed) silence. Under these circumstances, defendant's right to due process was not violated.

Next, defendant argues that the trial court erroneously denied his motion in limine to preclude the prosecutor from impeaching him with a 1985 armed robbery conviction. Because defendant never testified, however, this issue is waived. *People v Finley*, 431 Mich 506, 521, 525-526; 431 NW2d 19 (1988).

Defendant next argues that two jurors who either were a prior victim of a crime or who had a family member who was a prior crime victim should have been excused for cause. Because defendant never challenged the jurors for cause, this issue is not preserved. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Eccles*, 260 Mich App 379, 381-382; 677 NW2d 76 (2004).

A prospective juror may be excused for cause if the juror is biased for or against a party or has a preconceived opinion or state of mind that would prevent the juror from rendering a fair verdict. See MCR 6.412(D)(1) and MCR 2.511(D)(3), (4) and (5). In this case, the record does not support defendant's claim that the jurors in question should have been disqualified for cause. Despite being a victim of crime, or being related to a crime victim, the jurors indicated that they could decide the case fairly. See *People v Lee*, 212 Mich App 228, 249-252; 537 NW2d 233 (1995). Thus, plain error has not been shown.

Defendant alternatively argues that his attorney was ineffective for failing to either challenge the jurors for cause or to peremptorily excuse the jurors. We disagree.

Because defendant did not raise this ineffective assistance of counsel claim in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994); see also *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312, 314. That is, defendant must show that the error might have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra*. Every effort must be made to eliminate the distorting effects of hindsight. *Id.*; see also *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

In this case, because the record fails to establish that the jurors in question should have been dismissed for cause, defendant has failed to show that trial counsel was ineffective for not requesting their dismissal for cause. Counsel is not required to make a futile challenge. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Additionally, counsel's decision whether to peremptorily excuse the jurors was a matter of trial strategy, and defendant has failed to overcome the presumption of sound trial strategy. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). Therefore, this claim fails.

Defendant also argues that trial counsel was ineffective for failing to more vigorously impeach the victim and for failing to make an offer of proof concerning defendant's expected testimony. We again disagree.

Whether and how to impeach a witness is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged impeachment error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *id.* In this case, defendant argues that counsel should have impeached the victim more vigorously concerning discrepancies between her testimony and the restaurant's surveillance photographs, in particular, whether the perpetrator had his hand in his waistband, whether the perpetrator reached into the cash register with his left or right hand, and whether the perpetrator's other hand was visible on the counter at the time of the robbery. These matters were principally relevant to the question whether the perpetrator was armed. Defendant was acquitted of the greater armed robbery charge. Concerning defendant's identity as the perpetrator, the victim testified that she had no doubt that defendant was the person who robbed her. Defendant has not demonstrated a reasonable possibility that further impeachment of the victim would have made a difference in the outcome.

Nor has defendant shown that counsel was ineffective for failing to make an offer of proof concerning the substance of defendant's expected testimony. Counsel may have purposely refrained from making an offer of proof for strategic reasons because she was not certain what defendant would say, did not want to alert the prosecution to any anticipated testimony, or because she knew defendant would not say anything that would have made a difference. On appeal, defendant has failed to submit an affidavit or make any other factual representations concerning his proposed testimony. Under these circumstances, defendant has failed to overcome the presumption of sound trial strategy.

Next, defendant argues that the trial court erred in reinstating the armed robbery charge, which had been dismissed following the preliminary examination. We disagree.

"As a general matter, the district court's decision to bind over the defendant is subject to review for abuse of discretion." *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991). However, this Court "review[s] a circuit court's decision to grant or deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover." *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

At the preliminary examination, the district court must bind the defendant over for trial if it finds "probable cause that a crime was committed and probable cause to believe that the defendant committed it." *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). "Some evidence must be presented regarding each element of the crime or from which those elements may be inferred." *Id.* "[I]t is not, however, the function of the examining magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt of the defendant's guilt; that is the province of the jury." *Id.* at 469-470.

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon. MCL 750.529; *People v Taylor*, 245 Mich App 293, 297; 628 NW2d 55 (2001). A victim's subjective belief that the perpetrator had a weapon is, by itself, insufficient to establish armed robbery. *Id.* Rather, the prosecutor must introduce "some objective evidence of the existence of a weapon or article." *Id.* at 297-298, quoting *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993). A finger or other object hidden inside clothing is objective evidence of a feigned weapon. *Taylor, supra* at 299, 302. "Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article." *Id.* at 299, quoting *Jolly, supra* at 469-470.

In the present case, the victim testified at the preliminary examination, and at trial, that defendant kept his hand in his waistband and threatened to kill her during the robbery. This testimony was sufficient to give rise to probable cause that defendant was armed with a dangerous or feigned weapon. The trial court did not err in concluding that the district court abused its discretion in declining to bind defendant over for trial on the armed robbery charge. The charge was properly reinstated.

Defendant also argues that there was insufficient evidence at trial to justify submitting the armed robbery charge to the jury. We again disagree.

The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The test is whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *Id.*; see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Resolving credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

As discussed previously, evidence that defendant kept his hand in his waistband while threatening to kill the victim, viewed most favorably to the prosecution, was sufficient to justify submitting the armed robbery charge to the jury under a feigned weapon theory. Accordingly, we reject this claim of error.

Defendant next argues that the trial court erred in denying his motion to suppress evidence that the victim identified him in a photographic array where he was already in custody. We disagree.

A decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). A decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

Defendant correctly observes that, "[s]ubject to certain exceptions, identification by photograph should not be used where the accused is in custody." *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993), quoting *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled on other grounds by *People v Hickman*, ___ Mich ___; ___ NW2d

___ ; 2004 WL 1616425. In *Anderson, supra* at 186-187 n 22, the following exceptions to this general rule were identified:

1. It is not possible to arrange a proper lineup.
2. There are insufficient number of persons available with defendant's physical characteristics.
3. The nature of the case requires *immediate* identification.
4. The witnesses are at a place far distant from the location of the in-custody accused.
5. The subject refuses to participate in a lineup and by his actions would seek to destroy the value of the identification. [Emphasis in original.]

In the present case, the prosecutor presented evidence that it was not possible to arrange a proper lineup because, although defendant was in custody, there was an insufficient number of persons available who matched defendant's unique physical characteristics. The trial court found that "[t]here was an inadequate in-custody population to match the defendant's physical description." This finding is not clearly erroneous. Accordingly, the photo identification was not improper and the trial court did not err in denying defendant's motion to suppress.

Defendant argues that he is entitled to resentencing because the trial court erred in failing to conduct any inquiry before allowing him to represent himself at sentencing. We agree. A trial court's decision to allow a defendant to represent himself is reviewed for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

"[S]entencing is a critical stage at which a defendant has a constitutional right to counsel." *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Here, the trial court had an obligation to comply with the court rules governing a defendant's waiver of the right to counsel before allowing defendant to represent himself at sentencing. See *Hicks, supra* at 523.

MCR 6.005(D) provides, in pertinent part:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

The court must also "engage, on the record, in a methodical assessment of the wisdom of self-representation" *Hicks, supra*. "Before the trial court grants a request for self-representation, the trial court must find," as required by *People v Anderson*, 398 Mich 361, 367-

368; 247 NW2d 857 (1976), “(1) that the request is unequivocal; (2) that the assertion of the right of self-representation is knowing, intelligent, and voluntary, with the defendant having been made aware of the ‘dangers and disadvantages of self-representation’; and (3) that the defendant ‘will not unduly disrupt the court while acting as his own counsel.’” *Hicks, supra*, quoting *People v Ahumada*, 222 Mich App 612, 614-615; 564 NW2d 188 (1997).

In this case, defense counsel informed the court at sentencing that defendant wished to represent himself. In response, the court did not advise or question defendant concerning his desired waiver of the right to counsel, but rather stated, “All right. Mr. Mitchell, are there any additions, corrections, deletions or modifications that need to be made to your report?” The court completely failed to comply with the requirements for a valid waiver of the right to counsel under both *Anderson* and MCR 6.005(D).

“Where there is error[,] but it is not one of complete omission of the court rule and *Anderson* requirements, reversal is not necessarily required . . . ‘depend[ing] on the nature of the noncompliance.’” *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 (1994), quoting *In re Guilty Plea Cases*, 395 Mich 96, 113; 235 NW2d 132 (1975). In this case, however, the court’s error was “one of complete omission of the court rule and *Anderson* requirements.” Accordingly, we vacate defendant’s sentence and remand for resentencing. See *Dennany, supra* at 447-448; see, also, *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998).

Defendant also argues that the trial court improperly departed from the sentencing guidelines range of 29 to 114 months when it sentenced him to life imprisonment, without providing substantial and compelling reasons for the departure. Because we are vacating defendant’s sentence and remanding for resentencing for an independent reason, this issue is technically moot. We agree, however, that the trial court failed to comply with applicable requirements when departing from the guidelines.

MCL 769.34(3) provides that “[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” A substantial and compelling reason for departure must be objective and verifiable, and must be a reason that “keenly” or “irresistibly” grabs a court’s attention, is of “considerable worth” in deciding the length of a sentence, and exists only in exceptional cases. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). Additionally, MCL 769.34(3)(b) provides that “[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” Also, the substantial and compelling circumstances articulated by the court must justify the particular departure imposed in the case. *Babcock, supra* at 259; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). In determining whether a sufficient basis exists to justify a departure, the principle of proportionality, i.e., whether the sentence is proportionate to the seriousness of the defendant’s conduct and the defendant in light of his criminal record, defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed. *Babcock, supra* at 262, 264.

In the present case, the trial court referred to defendant's prior criminal record, but never acknowledged that its sentence was a departure from the guidelines or explicitly articulated substantial and compelling reasons for the departure. Although defendant's prior criminal record formed the basis for the scoring of the prior record variables in calculating defendant's minimum sentence range under the guidelines, the trial court never found that defendant's prior record was given inadequate weight by the guidelines or otherwise justified a departure from the recommended range. On resentencing, the trial court shall comply with the applicable court rules and statutory requirements governing sentencing, including counsel waiver and sentence departures, as well as the sentencing requirements prescribed in *Babcock, supra*.

Defendant's conviction is affirmed, but his sentence is vacated and the case remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad